THE DOCTRINE OF THE RENVOI IN ANGLO-AMERICAN LAW

A DISCUSSION of the merits of the renvoi must proceed independently of the English and American cases in which that doctrine has been involved. Indeed there is practically no analysis of the principles underlying the renvoi to be found in Anglo-American case law. The word "renvoi" itself does not appear in either an English or American judicial opinion prior to 1903.[1] This is the more remarkable when one takes into account the fact that the English courts were called upon before the courts on the Continent to decide a case in which the renvoi was squarely presented. Certainly as early as 1841 such a case came before the English courts.[2] The earliest continental case, on the other hand, seems not to have arisen until fifteen years later.[3] Discussion of the renvoi received its initial impetus on the Continent when the French Court of Cassation adopted it in the Forgo Case, finally decided in 1882.[4] From that time on until 1900, when it was rejected by the Institute of International Law at Neuchâtel, and contemporaneously incorporated in part in the German Code (*Einführungsgesetz*, Article 27), there grew up on the Continent a large body of case law and juristic writing relating to that doctrine. Notwithstanding the earlier start in England, the English cases in which the renvoi has been involved are far from numerous, and the volume of English juristic writing thereon is quite negligible when compared with the *quantum* of continental output.

In the present paper the writer proposes to consider: *first*, the

[1] *In re* Johnson [1903], 1 Ch. 821, 831.

[2] Collier *v.* Rivaz, 2 CURT. ECC. 855 (1841).

[3] Court of Guelderland (Holland), 5 REVUE DE DROIT INTERNATIONAL, xiii, 410. There a gift was made in Prussia in the Prussian form of an immovable in Holland. The Prussian conflict-of-laws rule required an application of the *lex situs;* the Dutch rule, an application of the *lex actus*. The Dutch court declined the renvoi back to Dutch law, thus sustaining the gift, because sufficient as to form under Prussian law, the *lex actus*.

[4] Cass., June 24, 1878, D. 1879, 1, 56; Cass., February 22, 1882, S. 1882, 1, 393. For an account of this case in English, see SEWELL, FRENCH LAW AFFECTING BRITISH SUBJECTS, 46–77.

theory of the renvoi in relation to Anglo-American principles of the conflict of laws, and *secondly*, the extent to which, if at all, that doctrine has found its way into the English and American cases.

I. The Theory of the Renvoi in Relation to Anglo-American Principles of the Conflict of Laws

In order to make a concrete meaning of the renvoi, and also to furnish a basis for the theoretical discussion of that doctrine, the following example will be used:

X., a citizen of Massachusetts, dies intestate, domiciled in France, leaving movable property in Massachusetts, England, and France. The question arises as to how this property is to be distributed among X.'s next of kin.

Assume (1) that this question arises in a Massachusetts court. There the rule of the conflict of laws as to intestate succession to movables calls for an application of the law of the deceased's last domicile. Since by hypothesis X.'s last domicile was France, the natural thing for the Massachusetts court to do would be to turn to the French statute of distributions, or whatever corresponds thereto in French law, and decree a distribution accordingly. An examination of French law, however, would show that if a French court were called upon to determine how this property should be distributed, it would refer the distribution to the national law of the deceased, thus applying the Massachusetts statute of distributions. So on the surface of things the Massachusetts court has open to it alternative courses of action: (*a*) either to apply the French law as to intestate succession, or (*b*) to resolve itself into a French court and apply the Massachusetts statute of distributions, on the assumption that this is what a French court would do. If it accepts the so-called renvoi doctrine, it will follow the latter course, thus applying its own law.

This is one type of renvoi. A jural matter is presented which the conflict-of-laws rule of the forum refers to a foreign law, the conflict-of-laws rule of which, in turn, refers the matter back again to the law of the forum. This is renvoi in the narrower sense. The German term for this juridical process is "*Rückverweisung*."

Now let us assume (2) that the question of the distribution of the English movables arises in an English court. There, as in Massachusetts, the conflict-of-laws rule as to intestate succession

would call for a reference to the French law, as X.'s domiciliary law. But here again there are on the surface two alternative courses of action open to the English court, the one like that available to the Massachusetts court in (1), the other different: either (*a*) to apply the French law as to intestate succession, or (*b*) to take its cue from the French conflict-of-laws rule, and thus refer the question on to the Massachusetts statute of distributions, on the assumption that this is what a French court would do if called upon to pass upon the case. The adoption of the latter alternative means an acceptance of the renvoi.

In this latter case (2) the conflict-of-laws rule of the forum refers the jural matter to a system of law, the conflict-of-laws rule of which, in turn, refers the matter on for decision by the law of still a third legal unit. This is a less frequent type of renvoi, and indeed can be called an instance of renvoi, which means "a sending back," only in a wide sense of the term. The German term for this juridical process is "*Weiterverweisung*." [5]

There are then two types of renvoi cases, using the term "renvoi" in its widest sense: (1) where there is a "remission," a *Rückverweisung*, or reference *back* to the law of the forum by the conflict-of-laws rule of the foreign law, selected by the law of the forum to govern the jural matter; and (2) where there is a "transmission," a *Weiterverweisung*, or reference *on* to the law of some third legal unit by the conflict-of-laws rule of the foreign law, to which the law of the forum immediately refers the matter.

The issue raised by the renvoi doctrine may thus be stated in interrogatory form as follows: *When the conflict-of-laws rule of the forum refers a jural matter to a foreign law for decision, is the reference to the corresponding rule of the conflict of laws of that foreign law, or is the reference to the purely internal rules of law of the foreign system;* i. e., *to the totality of the foreign law, minus its conflict-of-laws rules?* [6]

If the doctrine of the renvoi be accepted, there is potentially

[5] Professor Lorenzen has suggested the term "transmission" for this type of renvoi: 10 COL. L. REV. 190, 197. Assuming that the word adequately describes the process of reference, it is hardly a companion term for the word "renvoi." A better suggestion still is that the word "remission" be used for "*Rückverweisung*" and "transmission" for "*Weitverweisung*," 14 L. QUART. REV. 232.

[6] In a strictly scientific sense the internal rules of law of a legal unit must, of course, include the body of conflict-of-laws rules, as well as the rules governing directly the creation and enforcement of rights. Throughout this article the phrase "internal rules

no limit to the classes of cases in which it would be applicable. In all cases where the conflict-of-laws rule of the forum differed from that of the foreign law to which it referred, the renvoi would have to be invoked. As between England and the continental nations this would mean that as to all those questions which English law refers to the law of the domicile, as, for example, succession, testate or intestate, capacity, marriage, divorce, etc., with respect to all of which the continental nations, for the most part, would apply the national law, the renvoi would be called into play. As a matter of fact the great bulk of cases in England and on the Continent in which the renvoi has been involved have related to post-mortuary succession to property.

In this country there would be a large field for the application of the renvoi doctrine, if adopted by the courts, in cases involving the determination of the validity and obligation of contracts. Perhaps in no branch of the conflict of laws is there greater divergence among the courts of this country than exists, respecting the choice of the law that shall govern contractual validity and obligation.[7] To show concretely how on the basis of the actual decisions, an acceptance or rejection of the renvoi might make a difference

---

of law," or "internal law," is used in the special sense indicated in order to set out clearly the exact problem involved in the renvoi.

Not infrequently the issue raised by the renvoi is stated to be: whether the reference to the foreign law by the law of the forum is to that law "in its totality," or to the specific provision of the foreign law directly applicable to the jural matter in question. See BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 53, 65, and Professor Lorenzen's articles on "The Renvoi Theory and the Application of Foreign Law," 10 COL. L. REV. 190, 194, 197, 198, 200, 339, 344.

Sometimes, also, the problem is stated, in somewhat different language, to be whether the reference is "to the whole law" of the foreign legal unit, or merely to its internal rules of law. DICEY (2 ed.), 714–15, 719; WESTLAKE (5 ed.), 31, 42, 113; BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 164, 168, 181, 183, 184; Jethro Brown, "*In re* Johnson," 25 L. QUART. REV. 145, 148; Sanderson, "The Law Applicable to the Succession to Land in Egypt owned by a British Subject," 20 JUR. REV. 46, 52. The objection to both forms of statement is that from the standpoint of the forum, a reference to the foreign law, "in its totality," or "to the whole law" of the foreign legal unit, might call for the simultaneous application of two different rules of that law: (*a*) what the writer has described as the purely internal rule, directly creating rights, and (*b*) the conflict-of-laws rule of the foreign law; only in the event that (*b*) referred to (*a*) would the distinction become unimportant. The error of this form of statement is clearly set forth by Abbott, "Is the Renvoi a Part of the Common Law?" 24 L. QUART. REV. 133, 135–36.

[7] See the series of articles on this topic by Professor Beale in 23 HARV. L. REV. 1, 79, 194, 260.

in these cases, we may suppose that a contract made in Pennsylvania is sued on in a Massachusetts court, and the court is called upon to determine the validity thereof. The Massachusetts rule as to the choice of law governing the validity of a contract requires an application of the law of place of making.[8] The validity of this contract, therefore, would have to be tested by reference to Pennsylvania law. But the Pennsylvania conflict-of-laws rule, relative to the selection of the law that shall govern such a question, would require an application of the law of the place of performance of the contract.[9] If we assume (*a*) that the contract in litigation was to be performed in Massachusetts, or (*b*) that it was to be performed in Virginia, we should, on the supposition that the renvoi is part of Massachusetts law, have an instance of "remission" or *Rückverweisung*, in the one case (*a*), and "transmission" or *Weiterverweisung*, in the other (*b*). It is a little remarkable, in view of the vast number of cases involving the choice of the law governing the validity of a contract, that neither court nor counsel has suggested very clearly the possibilities of an application of the renvoi. Perhaps this shows that the whole doctrine is foreign to our methods of legal thought. The English courts have been drawn into it, because of the nearness of England to the Continent, and the conflict between the law of the domicile and the law of nationality, in the English and continental systems of private international law.

Reverting to the hypothetical case stated at the outset (1), which involved the renvoi in the narrower sense of "remission" or *Rückverweisung*, it is now proposed to follow out the possibilities presented by this case, for the purpose of ascertaining, which of all the conceivable solutions accords with Anglo-American principles of the conflict of laws. This plan necessarily embraces in it a discussion of the merits and demerits of the renvoi. Though the case taken for this purpose does not on its facts involve a "transmission" or *Weiterverweisung*, yet the arguments, applicable to the renvoi in the narrower sense, are for most part applicable as well to that doctrine which is presented by the second hypothetical case (2). Wherever by reason of the difference between the renvoi in the two senses of the term, special considerations seem controlling as to "transmission" or *Weiterverweisung*, account will be taken thereof.

[8] 23 HARV. L. REV. 98–100, where the cases are collected.

[9] *Ibid.*, 201–02, for the Pennsylvania cases.

It was stated that in decreeing the distribution of the movables in Massachusetts, the Massachusetts court had alternative courses of action open to it: either (*a*) to apply the internal French law of succession, or (*b*) to refer to the French conflict-of-laws rule, thus remitting the question to be decided according to the Massachusetts statute of distributions. Closer analysis shows, however, that there are really four, and not two, alternative courses of action:

A. The Massachusetts court may refer to the French conflict-of-laws rule, on the theory that it should decide the case as a French court would. Logically this would mean that in referring the matter back again to Massachusetts law, the reference must be taken to be to the Massachusetts conflict-of-laws rule, calling for an application of the domiciliary law of the deceased. This, in turn, would cause a remission of the question a second time to the French conflict-of-laws rule, thus producing a *circulus inextricabilis*, or endless cycle of reference back and forth between the Massachusetts and French conflict-of-laws rules, without ever reaching a decision of the real issue. This has been appropriately described as an instance of international lawn tennis.[10] A mere statement of this alternative carries with it its own refutation, since it obviously does not solve the problem in the case, but merely gives rise to another problem, *viz.*, how and when shall this interminable cycle of reference be broken. Yet logically this is the very thing to which an acceptance of the renvoi must always lead in cases of "remission" or *Rückverweisung*, since if the Massachusetts conflict-of-laws rule is regarded as referring to the French conflict-of-laws rule, the latter by the same token must be held to refer back again to the former. If the cycle of reference back and forth be broken on the first reference back to the Massachusetts law, and thereby internal Massachusetts law be applied to the case, the necessary conclusion must be, that while the renvoi is good enough for Massachusetts law, it is not good enough for French law. In other words after the first reference to the foreign conflict-of-laws rule, the deadlock cannot be broken on any logical principle. This shows the logical unsoundness of the renvoi in the narrower sense.

Similar considerations are applicable to cases of renvoi in the

[10] BUZZATI, 18 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 146.

sense of "transmission" or *Weiterverweisung*, since it, too, can logically lead to no solution of the case presented. If an infinite variety of conflict-of-laws rules as to the given jural matter be assumed to exist, there might be an infinite number of references *on* to successive foreign laws without any decision of the merits of the case. This would be the result in the case supposed (2), if the Massachusetts conflict-of-laws rule required an application of the law of the last domicile of the deceased's father, which might have been, for example, New Hampshire, and the conflict-of-laws rule of New Hampshire, in turn, referred the question of succession *on* to still a fourth law, and so on *ad infinitum*. The English court would in such a case be referred first to French law, as the domiciliary law of deceased, then to Massachusetts law as his national law, then to New Hampshire law as the domiciliary law of his father, etc. Practically, of course, this infinite variety of conflict-of-laws rules does not exist. Thus in the case supposed, the English court would be referred to the French law, which would refer the question on to Massachusetts law, which would remit the question to French law; at this point would begin the endless shuttle between French and Massachusetts law. Thus we still have an instance of international lawn tennis, with only the difference that there is an additional player.

B. The Massachusetts court may apply its own statute of distributions, not because it is referred thereto by the French conflict-of-laws rule, that the deceased's national law shall govern, but on the theory that there is no law applicable to the jural matter, and thus to reach some result the court must fall back on its own law. In cases of "remission" or *Rückverweisung* this would produce a renvoi result, but not by the renvoi method. It would make impossible a reference *on* to the law of a third legal unit, *i. e.*, "transmission" or *Weiterverweisung*. Westlake [11] and Von Bar [12] have worked out an ingenious but fallacious theory to justify such a procedure. Adapting their theory to the facts of the hypothetical case under discussion, they would argue thus: The French internal rules as to post-mortuary succession must be read in

[11] 18 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 35–40, and 164–68. See also PRIVATE INTERNATIONAL LAW (5 ed.), 25–42.

[12] 1 THEORIE UND PRAXIS DES INTERNATIONALEN PRIVATRECHTS, 278–81; 18 ANNUAIRE, DE L'INSTITUT DE DROIT INTERNATIONAL, 41, 153–57, 174–75.

conjunction with the French rule as to the choice of law governing such succession, *viz.*, that the deceased's national law shall govern; thus interpreted the two rules simmer down to this: that the French internal law as to succession controls, provided the deceased was a French subject at death, but not otherwise; since by hypothesis X. was not a citizen of France, there is no rule of French law applicable to the determination of succession to his property. This is the so-called *désistement* theory, — the French law refuses to accept the reference offered by Massachusetts law; it desists, because it has no rules governing succession to property belonging to aliens. Consequently there is no alternative left but to apply Massachusetts law as the law of the forum; here also it happens to be the law of the *situs* of the property. This theory necessarily involves a holding that there is not only no applicable rule of French law, but also no applicable rule of Massachusetts law, except as Massachusetts happens to be here both the forum and *situs*. If the only function of the French conflict-of-laws rules be to limit the scope of the operation of the internal rules of French law, then by the same line of reasoning the Massachusetts conflict-of-laws rule must be intended to perform the same function. In other words the Massachusetts conflict-of-laws rule, that the law of domicile shall govern, must be read as limiting the internal rules of Massachusetts law respecting intestate succession, and the upshot of reading these two rules together is, that Massachusetts internal rules of distribution apply only in case the deceased was domiciled in that state on death. Since X. was not a French subject, French law is inapplicable; since he was not domiciled in Massachusetts on death, Massachusetts law is likewise inapplicable. There is here, therefore, a legal vacuum or gap, which must be bridged over, and which is bridged over by applying the law of the forum *as such:* otherwise no decision could be reached in the case. This has the appearance of being a scientific way of reaching a renvoi result without the objectionable renvoi process.

What then are the objections to this *désistement* theory? The theoretical objections are two: (*a*) It assumes that the purpose of the conflict-of-laws rules of any system of law is to define the limits of the spatial operation of the purely internal rules of that system. This is not so. The only occasion for a body of conflict-of-laws rules is the fact that the internal rules of the various systems

of law do not agree as to the consequences that shall flow from given acts or events. Under the Roman Empire this diversity of legal rules did not exist, since in theory, at least, there was only one world legal unit, and hence there could be no question as to what law should be applied to a given jural matter. Consequently there was no body of conflict-of-laws rules in the Roman law. But now that the world is divided up into a number of distinct and separate legal units, each supreme at least within its own territorial limits, and each possessing its own peculiar rules of internal law, it is imperative that there should exist a body of selective rules, whose function it is to choose that law, among several competing laws, that might possibly apply to a given jural matter which has the best claim to application. To say that this body of rules has no other function than to define the limits in space of the operation of the purely internal rules of law of each legal unit, is to rob it of the very purpose that called it into existence. As Dr. Bate puts it:[13] "It makes the dissonances which have created the need for international law the reason for denying its existence." The function of the rules of the conflict of laws is not *definitive*, but *selective*.

(*b*) The second theoretical objection to the *désistement* theory is its assumption that when in the case put (1) the Massachusetts court seeks to ascertain the provisions of French law as to distribution, following out its own conflict-of-laws rule that the law of deceased's last domicile shall govern, its purpose is to enforce French law as such. The truth is that the Massachusetts court is enforcing its own law throughout, and is not in any sense enforcing French law. It was not created for that purpose. It is the function of the Massachusetts law to say as to cases arising in its courts, what constitutes an adequate tie or bond between persons, things, conduct, or events and French territory to justify the application of internal French law to the jural matter, or any phase of it. It is not for French law to pass upon the adequacy of this tie for the purpose named. If the law of Massachusetts determines that the fact of domicile of a deceased in France at the time of his death is a sufficient tie to justify the application of French internal law to the matter of the succession to his movables, then that is an end of the matter, so far as concerns any movables located in Massachusetts; and this, entirely independent of the fact that French

[13] BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 74.

law would select the applicable law by reference to the deceased's national law.[14]

The following are the practical objections to the *désistement* theory: (*a*) It makes rights depend upon the law of the chance forum, which in the case of succession to movables would also be the law of the *situs*. In the second case supposed (2), where the English court is called upon to decree the distribution of X.'s English movables, the result of this theory would be that English internal law would have to be applied, thus eliminating all possibility of "transmission" or *Weiterverweisung;* the English conflict-of-laws rule would point to French law as applicable because X. was domiciled in France at death, but French law would wash its hands of the question on the theory that its rules of distribution could apply only to French subjects. Thus the movable estate of a deceased would pass piecemeal instead of as a unit, an end the securing of which is the analytical justification for the rule that gives effect to the law of deceased's last domicile in the distribution of his movables wherever located. As pointed out by Dr. Bate,[15] this would be productive of results not only undesirable, but in some cases also "positively anti-social," as, for example, in a case where an English court is called upon to pass upon the validity of a marriage between two Danish subjects domiciled in France, valid by both French and Danish internal law; such a marriage might be invalidated by English law, notwithstanding its compliance with the internal law of the domicile of the parties, France, and the internal law of the parties' national sovereign, Denmark, solely because England happened to be the forum, and in spite of the fact that no element of the transaction occurred where English law is applicable as the territorial law.

(*b*) A second practical objection to the *désistement* theory is that it throws upon the local judge the burden of deciding whether or not the foreign law desists, and throws upon the attorney, called upon to advise his client as to what law will govern his conduct, the same burden. The difficulty of determining such a question may be seen by an examination of the English cases, later to be considered, in which the court thought it pertinent to ascertain whether French law recognizes a *de facto* domicile as the basis of the enjoy-

[14] BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 78, 90–94.

[15] *Ibid.*, 75.

ment of civil rights, or requires, under Article 13 of the French Civil Code, governmental authorization for that purpose.[16]

C. A third possible course of action open to the Massachusetts court is to proceed on the renvoi theory. This would mean that the Massachusetts conflict-of-laws rule, that X.'s movable property should be distributed according to the law of his last domicile, would be construed to refer to the French conflict-of-laws rule, selecting X.'s national law for this purpose, which in turn would be construed to refer to the internal law of Massachusetts applicable to intestate succession, *i. e.*, the Massachusetts statute of distributions. As already indicated in the second hypothetical case taken as the basis of this discussion, a like reference would be made to internal Massachusetts law, in a case of "transmission" or *Weiterverweisung.* This is the renvoi pure and simple. There are at least four objections to the adoption of this course of action:

(*a*) It is illogical. No logical reason can be given why if in the one case (1) Massachusetts law be taken to refer to the French conflict-of-laws rule, the latter should not in turn be held to refer back again to the Massachusetts conflict-of-laws rule, and so on *ad infinitum;* or why if in the other case (2) the English conflict-of-laws rule be regarded as referring to the French conflict-of-laws rule, the latter should not likewise refer to the Massachusetts conflict-of-laws rule, producing in the end a shuttle between the Massachusetts and French law, as already explained.

(*b*) A second objection to the renvoi is that it results in the abrogation or amendment of the conflict-of-laws rule of the forum by the corresponding rule in the foreign law to which the law of the forum refers. Thus in the first case (1) the practical result is that the French conflict-of-laws rule, giving effect to X.'s national law, is allowed to be substituted in a Massachusetts court for the Massachusetts conflict-of-laws rule pointing to the law of X.'s domicile; the Massachusetts conflict-of-laws rule thus becomes in fact to select X.'s national law as applicable, and not his domiciliary law. A similar abrogation of the English conflict-of-laws rule in favor of the French rule selecting the national law takes place in the second case, instancing renvoi in the wider sense (2).[17]

[16] See BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 75–76, on this point.

[17] See on this the dissenting opinion of Mr. Justice Taschereau in Ross *v.* Ross, 25 Can. S. C. 307, 353–54 (1894).

(*c*) A third objection to the renvoi is that it is based upon the erroneous assumption that the Massachusetts and English courts in the cases supposed should constitute themselves French courts, charged with the administration and enforcement of French law, and should decide the questions presented exactly as a French court would. But the Massachusetts court in the one case, and the English court in the other, are not functioning as French courts in decreeing the distribution of movables formerly belonging to a deceased domiciled at death in France. They exist and were created for the administration and enforcement of Massachusetts and English law respectively.[18] Furthermore, even conceding that the Massachusetts and English courts should resolve themselves into French courts and decide the cases just as a French court would, it must be obvious that this cannot be done without an inquiry into the question of whether or not the renvoi is a part of the French law. If it is, then on the assumption made, no solution of either case could be reached, since in the one case we should have an indefinite cycle of reference back and forth between Massachusetts and French law, and in the other case, either an indefinite and interminable reference *on* or the same cycle of reference as in the previous case; if the renvoi is not part of French law then Massachusetts internal law would be applicable in both cases. However, if the renvoi is good enough to be a part of Massachusetts and English law, it would seem also to be good enough for French law, and the result would be that the perpetual deadlock of reference previously pointed out would sooner or later arise.

(*d*) A final objection to the renvoi, and one closely akin to (*b*) and (*c*), is, that it is premised upon the assumption that in the Massachusetts and English courts it is the function of French law, and not Massachusetts and English law respectively, to determine what tie or bond between persons, things, conduct, or events and French territory is sufficient to justify an application of French internal law. The error of this assumption has been shown.

The chief practical argument urged in favor of the adoption of the renvoi is that it would result in uniformity of decision of the same question by the courts of the various legal units concerned.[19] Thus in the two cases taken as the basis of this discussion, the

[18] BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 105–07.

[19] BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 181–83.

argument would be made, that if the Massachusetts court accepts the reference back to its internal law offered by the French conflict-of-laws rule, and if in addition the English court accepts the reference *on* to internal Massachusetts law offered in like manner, the courts of all three legal units concerned in the distribution of X.'s movable estate will reach the same result, and the entire estate, no matter where located, will pass as a unit and not piecemeal. If this identity of result could be thus secured, a practical justification for the acceptance of the renvoi in both its forms, at least in cases of succession, might well be held to exist. But the assumption that such an identity of result can be secured by an adoption of the renvoi fails to take into account an important factor, *viz.*, that the renvoi must be assumed to be part of French as well as Massachusetts and English law, for if it is properly a part of one system of law, it would seem to be also properly a part of all the systems of law concerned. On this further assumption, the French courts in distributing the movable estate located in France would apply the rule of nationality, which would occasion a reference to Massachusetts law, and the latter would in turn refer the question back to French internal law. Hence as to the French movables French internal law would ultimately govern, thus upsetting the identity of result so much desired. The truth is that such identity of result can be secured in all cases only by the international adoption of a uniform body of conflict-of-laws rules. In that event there would be no occasion for the renvoi, since it is only the differences in the conflict-of-laws rules of various legal units that gives rise to the question as to whether the conflict-of-laws rule of the forum refers directly to the provision of the internal foreign law, or to the conflict-of-laws rule of the foreign system, — the question which, as previously shown, lies at the very bottom of the renvoi.

It has, indeed, been vigorously urged [20] that the argument to show identity of result in the matter of movable succession cannot be attained by an acceptance of the renvoi, because the French courts, as well as the English and Massachusetts courts, in the cases supposed, must be taken to have adopted that doctrine, ". . . is a figment of theory and not based on a solid practical difficulty," since, "in any particular case, the English court, or the French court, or the Massachusetts court would know whether

[20] BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 182–83.

the other had already dealt with the succession," and hence "would adopt the principle already applied to the succession, and apply either its own rules of private international law, or the doctrine of the renvoi, so as to subject the whole movable succession to one law." The suggestion is a startling one. It makes the acceptance or rejection of the renvoi by the court of a given legal unit depend upon whether the renvoi has been rejected or accepted by the particular foreign law to which the conflict-of-laws rule of the forum refers. This would necessarily mean that there could be no general acceptance or rejection of the renvoi by a given legal unit, since all would depend upon the exigencies of each particular case.

There is, however, at least, a limited class of cases in which an acceptance of the renvoi would produce identity of decision by the courts of the various legal units interested in such cases, *viz.*, those cases where both the national law of the parties and their domiciliary law agree that one or the other, *i, e.*, either the internal law of the nation or the internal law of the domicile, is the competent law applicable to the case, and where, in addition, the only existing conflict-of-laws rules known to any legal unit are either that the national law or that the domiciliary law shall be selected. Such a case would arise if two Italian subjects acquired a French domicile and thereafter married. The validity of the marriage under both French and Italian law would have to be tested by Italian internal law, as the national law of the parties, whereas according to English conflict-of-laws rules it would have to be tested by French internal law, as the domiciliary law of the parties; hence in a given case the English courts might find the marriage valid, when both the French and Italian courts would reach an opposite result, or *vice versa*. However, if the English court should accept the reference on to Italian law offered by the French conflict-of-laws rule, the courts of all three legal units would reach the same result. Whether or not French and Italian law, or either of them, had accepted the renvoi could not affect this result. In an actual case involving an analogous situation of fact,[21] the English courts, as we shall see, invoked the renvoi. It is only in this limited class of cases that a practical reason can be urged for an acceptance of the renvoi. Obviously, however, this is no argument for its general acceptance.

[21] *In re* Trufort, 36 Ch. 600 (1887).

D. The final course open to the Massachusetts and English courts in the cases supposed is to regard the reference to the foreign law by the conflict-of-laws rule of the forum as one directly to the appropriate rule of the internal foreign law. This seems the natural course to follow, and is the one best supported by authority, both judicial and juristic. The arguments in its favor have been indicated in a negative way in the elimination of the other alternatives. They are principally these:

(*a*) By such direct reference to the applicable rule of the internal foreign law, all possibility of a tossing back and forth of the legal question in a case can be avoided. This is a practical and logical advantage.

(*b*) It is consistent with the general common-law theories of the conflict of laws, *viz.*, that courts exist for the enforcement of the law of the legal unit creating them, and none other, and that when the law of the forum points to a foreign law for the decision of a question, it determines for itself, wholly without reference to that foreign law, what tie between persons, things, conduct, or events and the legal unit within which the foreign law is supreme, is sufficient to warrant invoking that law.

II. To What Extent, if at all, has the Renvoi found its Way into the English and American Cases?

A. The English Cases

The earliest English case cited in support of the proposition that the renvoi has been adopted by the English courts is *De Bonneval* v. *De Bonneval*,[22] decided in 1838. There a testator whose last domicile was France made two wills, one in the English form in England, disposing of his property there, and the other in the French form in France, disposing of his French property. A petition was filed in the Prerogative Court of Canterbury (before Sir Herbert Jenner), for the probate of the English will, which did not conform to French internal law as to form. The court held that since the testator was domiciled at death in France, the validity of his will was to be tested by French law. However, feeling that the French courts were better qualified to determine the validity of this will under the French law than an English court could be,

[22] 1 Curt. Ecc. 856.

the court further said (pages 869–70), that those courts were "the competent authority" to decide that question, and accordingly suspended proceedings on the will until its validity or invalidity had been pronounced by the French courts.

Taking only the language of the court within the four corners of its opinion, it is difficult to find any support for the renvoi in this decision. The court did say, and correctly, that the validity of the will depended upon its compliance with French law; but it failed to state whether it meant thereby internal French law as to form, or the rules as to form prescribed by the law to which the French conflict of laws would refer, which might be, and in the event was, a very different body of law. Only on the assumption that the court meant to say the latter can the case be made to support the renvoi.

In point of fact, when the will came before the French Court of Cassation, that court did apply the French conflict-of-laws rule (Article 999 of the French Civil Code) to sustain it. Under that code provision a will executed by a Frenchman in a foreign country was valid, if it complied with the law of place of execution as to form, even though it did not comply with French internal rules of law in this respect. In this fashion the will in question was sustained, because it conformed with the internal English rules as to form.[23] If the opinion of the Court of Cassation be read into that of the English court, and the latter be regarded as going through the processes which the French court did to sustain the will, the English decision can be made to speak the renvoi. The propriety of doing this depends upon whether or not the English court should have foreseen that the Court of Cassation might invoke a French conflict-of-laws rule, if, taking into consideration the totality of the French law from the viewpoint of a French court, such invocation was proper. To impute such foresight to the English court seems not unreasonable. If courts habitually defer in the administration of the estates of persons domiciled abroad to the courts of the domicile, the result must necessarily be a tacit acceptance of the renvoi, wherever the decision of the domiciliary courts is reached by an application of the conflict-of-laws rule there in force.[24]

[23] Cass., February 6, 1843, S. V. 1843, 1, 209.

[24] The only case referred to in the opinion in the De Bonneval Case, and apparently

There is nothing in the English reports showing the subsequent career of the De Bonneval Case in the English courts. However, the judgment of the Court of Cassation [25] states that the parties before that court conceded that the will had been admitted to probate by the Prerogative Court of Canterbury, after the judgment of the Cour Royale de Rouen sustaining the will which the Court of Cassation later affirmed. The result of the case, therefore, may well be said to involve a tacit acceptance of the renvoi.

The next case, *Collier* v. *Rivaz*,[26] was decided three years after the De Bonneval Case (1841). The opinion is by the same judge who decided that case, and hence, if it can be said to countenance the renvoi, it may be regarded as throwing light on the question of whether or not the De Bonneval Case impliedly accepted that doctrine. In the Collier Case a British subject died domiciled in Belgium. In the language of the report (page 855), "he left a will and six codicils, four of those codicils were not executed according to the forms required by the law of Belgium." A possible inference from this statement is that the will and two codicils, as to which there was no contest, did comply with the Belgian requirements as to form, and were admitted to probate on that ground. At the time of the testator's death (1829), the Code Napoléon was in

the only prior case in which an English probate court suspended proceedings pending the determination of the validity of a will by the courts of the testator's last domicile, is Hare *v.* Nasmyth, 2 ADD. 25 (1823). The question in that case was whether the will of the testator, domiciled at death in Scotland, had been revoked, a question which the English court refused to pass upon, referring for a decision thereof to the Scotch courts. As shown by the opinions of the judges in the House of Lords, to which the Scotch case was ultimately appealed, the case was decided by those courts on ordinary principles applicable to the revocation of wills, without reference to the Scotch conflict-of-laws rules. See 1 SH. SCOTCH APP. CAS. 65; 3 HAGG. ECC. 192, note; and 1 SH. 112.

In the following cases the English courts have stated that the courts of a deceased's last domicile have jurisdiction to determine succession to movables formerly belonging to the deceased, no matter where the same may be located: Enohin *v.* Wylie, 10 H. L. C. 1 (1862); Doglioni *v.* Crispin, 1 H. L. 301 (1866); *In re* Trufort, 36 Ch. 600 (1887). Similar statements are made by English text-writers: DICEY (2 ed.), 391–92; WESTLAKE (5 ed.), 114–15. If these cases be regarded as going to the extent of holding that a judgment of the deceased's domiciliary courts will be enforced in England, even though such judgment be reached by an application of the conflict-of-laws rules of the domicile, then, as pointed out by Westlake, they amount to a tacit acceptance of the renvoi. However, the only case which may be said to have gone to the extent of announcing any such doctrine is *In re* Trufort, which will be discussed later on.

[25] Cass., February 6, 1843, S. V. 1843, 1, 209, 218.

[26] 2 CURT. ECC. 855.

force in Belgium. Article 13 provided in effect that a person establishing a domicile in Belgium with governmental authorization should enjoy all civil rights. The Belgian conflict-of-laws rule as to choice of law governing testamentary form pointed to the national law of the testator. The court concluded from the testimony of experts in Belgian law that the provisions of that law as to testamentary form did not apply to foreigners domiciled in Belgium without governmental authorization, and that the Belgian courts would sustain the codicils if executed in conformity with the requirements of the testator's national law; and on these two grounds held the codicils valid.

The following are the significant parts of the court's opinion:

(Pages 858–59.) "The question however remains to be determined, whether these codicils which are opposed are executed in such a form *as would entitle them to the sanction of the Court which has to pronounce on the validity of testamentary dispositions in Belgium*, in the circumstances under which they have been executed. Because it does not follow, that Mr. Ryan (the testator), being a domiciled subject of Belgium, he is therefore necessarily subject to all the forms which the law of Belgium requires from its own native born subjects. I apprehend there can be no doubt that every nation has a right to say under what circumstances it will permit a disposition, or contracts of whatever nature they may be, to be entered into by persons who are not native born, but who have become subjects from continued residence; that is, foreigners who come to reside under certain circumstances without obtaining from certain authorities those full rights which are necessary to constitute an actual Belgian subject. Every nation has a right to say how far the general law shall apply to its own born subjects, and subjects of another country; *and the Court sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case.*"

(Page 861.) "Then if this is the law of Belgium; if the succession with regard to such persons who came to reside in Belgium as Mr. Ryan did is governed by the laws of their own country; then the law of his own country being followed by Mr. Ryan, these codicils are entitled to probate."

(Pages 862–63.) ". . . they [the experts in Belgian law] do not consider that Mr. Ryan, as a foreigner, was bound by the requisites of the law of Belgium, as to the form and execution of a will, as would necessarily be the case with a free, natural born, subject of Belgium; but the succession of persons who, however long they might have been resident, not having obtained the royal authority to reside there, being

considered as mere foreigners, would be governed by the laws of their own country, and would be upheld by the Courts of Belgium, if those Courts were called on to decide. The Court sitting here decides from the evidence of persons skilled in that law, and *decides as it would if sitting in Belgium.*"

These extracts from the court's opinion show that the court proceeded on a combination of the *désistement* and the straight renvoi theories to sustain the codicils, without being conscious of the difference. Especially noticeable is the assumption of the court that the same decision should be reached by an English court that a Belgian court sitting in the case would have reached, and the further assumption that Belgian and not English law is to determine what tie between persons and Belgian territory is sufficient to call for an invocation of Belgian law in the English courts; both of these assumptions, which lie at the root of the *désistement* and renvoi theories, have been shown to be false. The case is open to all the objections noted as applicable to those theories, to the objection that apparently the will and the two codicils, as to which there was no dispute, were sustained because in compliance with internal Belgian law as to form, whereas the contested codicils were sustained because in compliance with internal English law as to form — an odd result — and to the further objection that there could be no guaranty that the English court was reaching the Belgian result without evidence as to whether the renvoi was part of Belgian law, as to which there was not an iota of evidence.[27]

The case of *Maltass* v. *Maltass*,[28] by way of what may be considered a *dictum*, referred to *Collier* v. *Rivaz*, though it is not clear from the opinion just how far the court meant to approve of that decision.

The next case in which the renvoi was directly involved was *Frere* v. *Frere*.[29] There a testator, domiciled in Malta, made a will in the English form while temporarily in England. His domicile at death was still Malta. His will was attested by three witnesses,

[27] It is interesting to note that about forty years after the Collier Case the Belgian courts judicially accepted the renvoi, in Tribunal Civil de Nivelles, February 19, 1879 [BELGIQUE JUDICIAIRE, 982 (1880)], and in Bigwood *v.* Bigwood, App. Brussells, May 14, 1881 [BELGIQUE JUDICIAIRE, 758 (1881)]. This decision has since been consistently followed: see Professor Lorenzen's article, 10 COL. L. REV. 192, notes 8 and 9.

[28] 1 ROB. ECC. 67, 72 (1841).

[29] 5 NOTES OF CASES, 593 (1847).

whereas Maltese law required no less than five. A Maltese advocate testified that the will of a Maltese subject by birth or domicile would be valid both as to movables and immovables in Malta if made according to the law of the place of its execution. Notwithstanding the fact that the executors named in the will renounced probate of it, and all parties in interest except certain minors consented to an intestacy, the court denied a motion for a declaration of the invalidity of the will on the ground that a Maltese court would have sustained the will, and it was incumbent on the English court to reach the same result as if it were sitting as a Maltese court. That part of the opinion which shows an application of the renvoi is interesting as an example of the matter-of-course style of argument habitually adopted by the courts in these cases. The court said (pages 595–96):

"But the question here is, whether a will made in this country, according to the law of this country, by a person domiciled in Malta, is a good and valid will in Malta; . . . . His [the Maltese advocate's] opinion, however, is, that a will made by a domiciled subject of Malta, but not in that island, according to the law of the country where it was executed, cannot be pronounced by the Courts of Justice at Malta invalid and of no effect. Then can I say that this will is invalid according to the law of Malta? Certainly not."

As this extract from the opinion shows, there is no argument of the renvoi, either on principle or on authority. A renvoi result is simply assumed as natural and indisputable.

The leading English case on the renvoi, and the only case which has gone to an appellate court, is *Bremer* v. *Freeman* (1857).[30] There is a sharp difference of opinion as to whether the case accepts or rejects the renvoi.[31] The case was heard on appeal by Lord Wensleydale, Dr. Lushington, Sir John Patteson, and Sir Wm. H. Maule, and the opinion was written by the first-named judge. The issue was as to the formal validity of a will executed by a

[30] 10 MOORE P. C. 306.

[31] *That the case accepts the renvoi*, see DICEY (2 ed.), 716 and note 4; WESTLAKE (5 ed.), 127 (§ 89); BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 166–67 (it is not entirely clear that the author meant to put this interpretation on Bremer *v.* Freeman, though this seems a fair construction of his language); Brown, "*In re* Johnson," 25 L. QUART. REV. 145, 150; *that the case rejects the renvoi*, see Abbott, "Is the Renvoi a Part of the Common Law?" 24 L. QUART. REV. 133, 143–44.

British subject, domiciled *de facto* in France at death. The testatrix had made a will in France in the English, but not in the French, form, dealing with movables which were principally in England. She had at no time obtained from the French government authorization to establish in France such a domicile as would carry with it, under Article 13 of the French Civil Code, the full enjoyment of all civil rights.[32]

The Prerogative Court of Canterbury (Sir John Dodson) allowed eight French advocates to testify as to the effect of a lack of governmental authorization on the power of testation under French law, and concluded therefrom,[33] "that it is necessary in order to establish such a domicile in France as to affect the succession of the testator and the mode of making wills, that that domicile should be by authorization." The court expressly referred to *Collier* v. *Rivaz*, and purported to follow that case in sustaining this will because of its compliance with English form (page 255).

This decree upholding the will was reversed by the Privy Council. Lord Wensleydale stated that there were two issues in the case: (*a*) as to where the testatrix was domiciled at death and (*b*) whether "by the municipal law of the domicile at the time of death, the will propounded was valid." There is nothing in the opinion directly showing whether Lord Wensleydale meant the phrase, "the municipal law of the domicile," to include both the internal and the conflict-of-laws rules of that law.[34] The first issue was resolved in favor of a French domicile. The second, and for our purposes more important, issue, was resolved against the validity of the will by an application of French internal law as to testamentary form. After reviewing the testimony of the experts, three of whom had stated that governmental authorization was not necessary to the establishment of such a domicile as to confer the power of testation under French law, and five of whom had stated that such authorization was necessary, and after examining French cases and treatises in point, Lord Wensleydale concluded

[32] The language of Article 13 of the French Civil Code is as follows: "The foreigner who shall have been admitted by the government to establish his domicile in France shall enjoy there all civil rights as long as he continues to reside there."

[33] DEANE'S ECC. 192, 255.

[34] Professor Lorenzen has argued that the phrase necessarily was meant to include the conflict-of-laws rules of the domicile, since only such a rule "could sanction a will executed in France in the *English* form": 10 COL. L. REV. 339–40.

(page 373) that it was not "established, that for the purpose of having a domicile which would regulate the succession, any authorization . . . was necessary." Commenting on *Collier* v. *Rivaz*, he said (page 374):

"The case was not regularly contested, which makes it of less authority. It was a mere question on the parole evidence of the Belgian law, which was very short and unsatisfactory. Their Lordships have referred to the depositions, and doubt whether the learned Judge was warranted by the evidence contained in them in coming to the conclusion which he did. In this case the evidence on both sides is very full, and leads to a different conclusion."

The only reference in Lord Wensleydale's opinion to French conflict-of-laws rules is the following (pages 362–63):

"It is to be remarked, speaking with all respect to those gentlemen (*i. e.* the expert witnesses as to French law), that the rule of international law which all English lawyers consider as now firmly established, namely, that the form and solemnities of the testament must be governed by the law of the domicile of the deceased, does not appear to be recognized, or at least borne in mind, by any of them. Nay, in *Quartin's Case*, both the *Cour Royale* and the *Cour de Cassation*, expressly decided that the will must be in the form and with the solemnities of the place where it is made, on the principle of '*locus regit actum*'; an error which is ably exposed in the opinion of *M. Target* in the *Duchess of Kingston's Case* (COLL. JUR. 323). The three witnesses called for appellant, Messrs. *Frignet*, *Senard*, and *Paillet*, all maintain the same doctrine.

"If this position were really true, the case of the appellant would prevail, but the other witnesses do not maintain the same doctrine. Of the five experts examined for the respondent, three, Messrs. *Blanchet*, *Herbert*, *De Vatismesnil*, all think that the will, either in the form required by the law of the domicile of origin, or the place where the party dwells, is valid; a position which, by English lawyers, is certainly now considered to be exploded since the case of *Stanley* v. *Bernes*."

The inference to be drawn from this extract is that Lord Wensleydale and his colleagues considered the rules of private international law to be of international validity, and consequently of international uniformity. Hence their adherence to the rule respecting the choice of law as to testamentary form as announced by the English courts, irrespective of whatever might be the corresponding rule as stated by the French courts. The possibility of a difference

between the English and French rules for the choice of the law governing testamentary form, as a legal matter, seems to have been regarded as not open to argument. If this be the correct exposition of the part of the opinion quoted, it would seem to follow that the case cannot be said to be an authority in favor of the proposition that the renvoi has been accepted by the English courts; since only in the event that the conflict-of-laws rule of French law as to form should differ from the corresponding rule of English law, and only in the further event of an application of the law chosen by the former law, can there be said to have been a renvoi in the sense of the word as used in this article.[35]

Conceding, then, that the case cannot be aligned very satisfactorily, either as accepting or rejecting the renvoi, as that word is here used, the question remains as to whether the case sanctions or disapproves of the *dêsistement* theory. There can be no doubt from a reading of the opinion of the Privy Council that the purpose of the inquiry into French law was to ascertain the specific provision of that law applicable to the form of will required of an English subject dying domiciled in France. But the significant fact is that the court, rightly or wrongly, concluded that the same form was required for such a will as would be required for the will of a French subject, and in this fashion found the will in issue to be invalid. There was therefore no desisting on the part of the French law. Hence the question propounded calls for a speculation as to what the court would have done had it concluded that there was no rule of French law applicable to the will in issue. Respecting this question Dr. Bate has said:[36]

"It will be seen that this case stops just where it begins to be interesting. Had the court come to the conclusion that French law had no rules of succession (testate or intestate) for a foreigner who was domi-

[35] It should also be stated that at the time of the case of Bremer *v.* Freeman, the French conflict-of-laws rule for the determination of the validity of a will in matters of substance was, that the national law of the testator should be applied; but as to the formal validity of a will the law of the place of execution alone was the applicable law. SEWELL, AN OUTLINE OF FRENCH LAW AS AFFECTING BRITISH SUBJECTS, chap. 5. In view of this state of the French law it would have made no difference in the result whether the Privy Council accepted or rejected the renvoi, since in any event the reference would have been to the French internal law as to form. This shows further the danger of relying too strongly on this case, either as for or as against the renvoi.

[36] BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 13.

ciled in France without authorization, the court would have had to say how it would deal with the lacuna. That it would not have applied French rules *malgré* French law seems a logical conclusion, for, otherwise, the long discussion as to the effect in France of the absence of authorization would have been unnecessary."

While the question, as indicated, is speculative, yet "the long discussion as to the effect in France of the absence of authorization" might very well be indulged in even if meant to reject the *désistement* theory, since the effect of authorization or no authorization might have been to require the application of a different rule of internal French law; for example, French law conceivably might have required two witnesses for wills of testators with an authorized domicile, but no less than three, for such as had not the necessary authorization. Furthermore the purpose of this excursion into French law seems to be shown in that part of the opinion which proceeds on the hypothetical assumption that an authorized domicile was necessary for the enjoyment of the legal power of testation (pages 365–66). Accepting that assumption, the lack of such authorization must produce, said Lord Wensleydale, one of two alternative results: (*a*) either deprive the foreigner of the power of testation altogether; or (*b*) deprive him of such power as to movables in France. Under the former alternative the will in issue would have been bad, and the estate would be distributed as in case of intestacy. According to what law would such distribution take place? The opinion does not leave this matter in doubt, for Lord Wensleydale said (page 365):

"If he [the testator] should be domiciled in a country where, on death, by law all his effects go to the sovereign by a '*droit d'aubaine*,' more extensive than that of old France, which applied only to personal effects within the kingdom, that law must prevail, and his will would be of no validity, and his relatives by his domicile of origin, would lose all their rights."

If, on the other hand, the lack of an authorized domicile went only to deprive a person of the power of testation as to French movables, still his will to be effective as to non-French movables would have to comply with French internal rules as to form. Throughout the opinion, therefore, the Privy Council showed that it was seeking the particular rule of internal French law applicable to the case,

and was not attempting to ascertain whether or not the French law would wash its hands of the case. That the French law might possibly desist seems not to have occurred to the judges. Hence the case is not a strong authority *for or against* either the renvoi, or the *désistement* doctrines.[37]

The next important case in the order of time is *Hamilton* v. *Dallas*.[38] There an Englishman died domiciled *de facto* in France

[37] 4 PHILLIMORE, INTERNATIONAL LAW, 211, 227–28, states that after the decision of the Privy Council in Bremer *v.* Freeman, an attempt was made to introduce evidence showing that the Council was mistaken in its interpretation of French law. To this end the defeated party requested the President of the Civil Tribunal of the Seine to name the French advocates most competent to form an opinion as to whether or not Lord Wensleydale's exposition of French law was correct. Ten advocates were named, and the admitted facts laid before them. They were unanimously of the opinion that the will was valid and not invalid according to French law. Their opinion, as set out in the French by Phillimore, after reciting the facts, concludes: "They (*i. e.*, the undersigned advocates) are positively of the opinion that according to French law the deceased never acquired in France such a domicile as to cause her will or the form of her will to be governed by the law of that country, and that consequently if the will was executed in conformity with the English law, the deceased would not be adjudged to have died intestate." The Privy Council refused to admit this evidence tendered after it had pronounced sentence. As Phillimore says, "it is open to the observation that the other side might possibly have produced an equal amount of testimony in support of the sentence."

The severity of the decision in Bremer *v.* Freeman led to the passage of Lord Kingsdown's Act, 24 & 25 VICT. c. 114, permitting British subjects to make wills of movables either in the form prescribed by the law of place of making, or according to the law of the domicile, or the domicile of origin, if within the British dominions.

[38] L. R. 1 Ch. 257 (1875).

Between Bremer *v.* Freeman and Hamilton *v.* Dallas, the following cases involving the renvoi incidentally should be noted: Crookenden *v.* Fuller, 1 Sw. & Tr. 441 (1859). A testatrix, whose domicile of origin was England, there made a will in the English form. She died a resident of France, but without having lost her domicile of origin; it was held that her will was valid since it conformed to the English law. By way of *dictum* the court added that even assuming the testatrix to have been domiciled in France at death, her will was none the less valid under the French rule that a will in the form of the law of place of execution was in compliance with the French law. This *dictum* involves an acceptance of the renvoi. Laneuville *v.* Anderson, 2 Sw. & Tr. 24; 38–39 (1860); testator domiciled at death in France executed in England a will in the English form: this will was held valid, since the French law would have referred the matter of its validity to the law of the place of execution. This ruling was only a *dictum*, since the court found that the will in question had been revoked by a later one. Onslow and Allardice *v.* Cannon, 2 Sw. & Tr. 136 (1861); testator domiciled in Scotland executed a will in the East Indies conformably to the local law there, but not in the Scotch form; it was opposed by the next of kin as invalid because not in the Scotch form. Pending the proceedings in opposition the Scotch courts held that a will of movables executed by a domiciled Scotchman abroad was valid if in the form of the law of place of execution; thereupon the next of kin withdrew their objections.

but without having secured the authorization necessary under Article 13 for the acquisition of such a domicile as would confer full civil rights. He left a will as to the validity of which there was no contest. By the death of one of the legatees in the testator's lifetime there was a partial intestacy. The issue was as to whether the next of kin should be determined by English or French law. The property involved was movable property located in England. It was held that since the testator was domiciled in France at death, the succession to his property should be governed by internal French law. The court pointed out that the deceased had asserted no civil right under French law as to the property in issue, since he had died intestate with respect thereto. The court said (page 270):

"He [the deceased] has asserted no right that I know of, except that of residing, and that he has a right to reside by the law of nations, by the law of France, and by every law of reason and good sense, is not to be disputed; but a right to succeed to the property of which he has died intestate is not comprehended in or covered by the 13th article."

Here then the court construes the English conflict-of-laws rule effectuating the law of the domicile to refer to the internal law of the domicile. There is not so much as a suggestion to be found in the opinion that the reference should be regarded to be to the conflict-of-laws rules of the domicile. Had that interpretation been put upon the English rule selecting the law of the domicile, the movables would have had to be distributed according to the English statute of distributions, since the applicable conflict-of-laws rule of French law would have referred to the law of the deceased's nation. This would have accorded with *Collier* v. *Rivaz*, to which, however, no reference was made in the opinion. The principal case is very like *Bremer* v. *Freeman*, with the difference that there the formal validity of a will was in issue, whereas here rights of intestate succession were in issue; in both cases the deceased's last domicile was France, and in both internal French law was applied. The principal case was a little clearer one for the application of French law, since it did not involve the exercise of any civil right within Article 13 of the French Civil Code. The weight of *Hamilton* v. *Dallas* as at least a tacit rejec-

In the Goods of Luigi Bianchi, 3 Sw. & Tr. 16, 17 (1862), contains a very faint suggestion of renvoi by way of *dictum*.

tion of the renvoi is the greater, because of the fact that had English law been found applicable, the Crown would have been entitled to a succession duty, of which the decision deprived it.

In the Goods of Lacroix[39] was a case in which the testator, a naturalized British subject residing in Paris, there executed in the English form a will disposing of his movables in England. Later while still resident in Paris he executed a will in the French form disposing of his property in France. There seems to have been some doubt as to what the testator's domicile was, but the court "inferred" that it was France (page 96). French law was not selected, however, as the law of the last domicile, but under the provision of Lord Kingsdown's Act (24 & 25 VICT. c. 114), validating a will made according to the form required by the law of the place of making. Evidence was adduced to show that by the French law the will of a British subject was valid if made in France in the form required by English law to give validity to wills executed by Englishmen in England, whatever the domicile of the testator at the time of making the will, or at death. On this evidence the court (Sir James Hannan) admitted the English will to probate. Furthermore the court conceded that the French wills, complying with internal rules of French law as to form, were likewise valid (pages 96–97). Thus as to the English will the reference made by the English conflict-of-laws rule embodied in Lord Kingsdown's Act, *viz.*, *locus regit actum*, was held to point to a rule of the French conflict of laws; whereas as to the French will the reference was regarded as designating the internal rules of French law. And this inconsistent holding was made without any consciousness on the part of the court of the differences in the legal processes involved.

In explanation of this case it should be said that the application for the probate of the will was *ex parte* and uncontested. The whole question of the renvoi was assumed by both court and counsel without the slightest reference to prior English cases in which that doctrine was involved. The decision has been well characterized by Dr. Bate,[40] as merely showing "how accommodating a judge will sometimes be rather than declare a will to be void in point of form."[41]

---

[39] 2 P. D. 94 (1877).

[40] BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 108.

[41] As a case construing Lord Kingsdown's Act the result may well be questioned

In *In re Trufort* (*Trafford* v. *Blanc*) [42] an action was brought to enforce the judgment of the Court of Appeal of the canton of Zurich, Switzerland, as a judgment *in rem* binding on the English movables of the testator. The testator, a born British subject, who later became a naturalized Swiss subject, died domiciled in France, leaving a will by which he gave all his property to his godson, X. P., claiming to be the legitimate son of the testator, sued X. in the Swiss courts, getting a judgment which declared that he was the legitimate son of the testator, and as such, entitled to nine-tenths of the estate as his compulsory portion according to the Swiss law of succession. The testator's personal estate was located in England, Switzerland, Italy, and elsewhere. According to French law the national law of the deceased would govern succession to his property. Furthermore by a treaty of 1869 between France and Switzerland, rights of parties claiming to share in the estate of a Swiss subject dying domiciled in France were to be determined according to the law and by the tribunals of Switzerland. The court held that since by the law of the testator's domicile at death, as well as under the treaty between France and Switzerland, succession to his property was to be governed by his national law, and since he was then a citizen of Switzerland, the Swiss courts had jurisdiction to determine finally such question of succession, and their judgment would be recognized and enforced in England, even though based upon a mistake of law or fact, or both.

The immediate question raised by this case relates to the effect of the Swiss judgment in England. This judgment, however, would be conclusive only as to property located in Switzerland at most, unless predicated upon proper jurisdiction in the Swiss courts. So the real question was as to the jurisdiction of the Swiss courts to render a judgment binding on the movable estate of the testator,

since the probable purpose of that act in enacting in its permissive form the rule *locus regit actum* was to insure the validity of wills executed by Englishmen in foreign countries, in accordance with the internal law of the place of making, as to which the testator would be able to get expert advice, whereas he could only with the greatest difficulty get such advice abroad, in regard to English internal rules of law as to wills. The result of the decision is hence to extend the remedial purpose of the act by making a will executed abroad valid, if (*a*) complying with the internal law of the place of making, or (*b*) complying with the law designated by the conflict-of-laws rule of the place of making.

[42] 36 Ch. 600 (1887).

wherever located. Under the English conflict-of-laws rule such jurisdiction exists in the courts of the deceased's last domicile.[43] Since the testator was domiciled at death in France, the French courts would have jurisdiction to render a judgment binding on the entire movable estate. But under the French conflict-of-laws rule the courts of the testator's nation would possess such jurisdiction. Hence if the English law took its cue as to jurisdiction from the French conflict-of-laws rule, the finding followed that the Swiss courts had jurisdiction, and their judgment was entitled to recognition and enforcement in England. That is the precise holding of the English court. Thus that court said (page 612):

"The testator's nationality then being Swiss at the time of his death it follows that the Zurich tribunals are those which according to the law of the testator's domicile have jurisdiction to decide on the right of succession to his estate, and in fact they have at the instance of the defendant been recognized as such by the Court of St. Julien.

"That being so, I have here an advantage similar to that which the Court had in *Doglioni* v. *Crispin*, that the claim of the party litigating in this Court has been actually raised and decided in the Courts which according to the law of the testator's domicile were the proper and competent tribunals to decide on their rights. Those tribunals have decided that the plaintiff is entitled to nine-tenths of the testator's personal estate, of which the funds which form the subject-matter of the present action are part, and in accordance with the principle laid down in *Doglioni* v. *Crispin*, I consider that I am bound by their decision."

There is therefore a renvoi in the sense of *Weiterverweisung* of the jurisdictional question in the case, since the English law referred to the French law, and then accepted the reference on to the Swiss law offered by the French conflict of laws as to jurisdiction. The authority of the case in this matter is weakened, however, by the existence of a treaty between France and Switzerland, subjecting the succession to the property of a Swiss subject dying domiciled in France to the operation of Swiss law, and to the jurisdiction of the Swiss courts. If the effect of this treaty was to extraterritorialize Swiss law and the Swiss courts so far as the questions of succession therein provided for, then it might well be contended

[43] Enohin *v.* Wylie, 10 H. L. C. 1 (1862); Ewing *v.* Orr Ewing, 10 A. C. 453 (1885); Doglioni *v.* Crispin, 1 H. L. 301 (1866); DICEY (2 ed.), 391–92, 720; WESTLAKE (5 ed.), 114–15; FOOTE (4 ed.), 252–53.

that the Swiss courts and law were to that extent French courts and law, and hence in legal effect the judgment sought to be enforced in England was the judgment of the courts of the testator's last domicile. It should be stated, however, that the main emphasis in the opinion is laid not upon the Franco-Swiss treaty, but upon the French conflict-of-laws rule referring the English court on to the law of the testator's nation. No contention was made that the French courts alone had jurisdiction to render a judgment in the matter of succession everywhere binding.

It has been contended that there was no question of renvoi involved in *In re Trufort*.[44] Thus Mr. Abbott has said:

"The facts, at most, show an interesting case of renvoi as between France and Switzerland, but that proves nothing as to English law. Nor is it material that indirectly this renvoi is effectuated by giving effect to the Swiss judgment. Since the time of Lord Ellenborough, England has enforced, without reference to the merits of the case, the judgment of a competent tribunal which had jurisdiction. The present case, therefore, is an example not of the *renvoi* but of *res judicata*."

This contention may be admitted without weakening the authority of the case as sustaining the renvoi. Only "the judgment of a competent tribunal which had jurisdiction" will be recognized and enforced in an English court. Whether the tribunal had jurisdiction will be determined by an application of English conflict-of-laws rules on that question. As to questions of succession the English rule acknowledges jurisdiction in the courts of the deceased's last domicile. In the instant case that would have meant that the French courts would have been possessed of such jurisdiction. But obviously this would not sustain a judgment entered by the Swiss courts. Such a judgment could be declared entitled to recognition and enforcement in an English court, only if the English conflict-of-laws rule effectuating the existence of jurisdiction in the courts of the domicile, France, allowed a reference on to the Swiss courts by virtue either of the treaty between France and Switzerland, or of the French conflict-of-laws rule conceding jurisdiction to the courts of a deceased's nation. The case, therefore, is more than an example of *res judicata*.

[44] Abbott, "Is the Renvoi a Part of the Common Law?" 24 L. QUART. REV. 133, 142; Professor Lorenzen, "The Renvoi Theory and the Application of Foreign Law," 10 COL. L. REV. 327, 334.

Professor Lorenzen has summarized the case as follows:

"This case has been cited in support of the doctrine of *Weiterverweisung*. In reality, it stands only for the limited proposition submitted to the Institute of International Law, and regarded by its members as distinct from renvoi, — to the effect that where the law of the State in which a party has a domicile and the law of the country of which he is a subject agree that the law of one of them is to govern, the rights created by such law should be enforced or recognized in all jurisdictions in which either the *lex domicilii* or the *lex patriae* is regarded as the proper rule."

The gist of this contention seems to be rather that cases such as *In re Trufort*, though strictly involving the renvoi, may well be treated as an exception to the rule which calls for the rejection of that doctrine. On the analysis made it would seem incorrect to maintain that there is no question of the renvoi in such a case. The justification for an exception allowing the renvoi, if there is any justification at all, is the practical desirability of the result thereby produced. Taking the facts of *In re Trufort*, the result of an acceptance of the renvoi is that the English, French, Swiss, and Italian courts will all reach the same result in the distribution of the deceased's movable estate, thus making the entire estate pass as a unit. Certainly the weight of opinion among English text-writers regards *In re Trufort* as a renvoi case.[45]

Perhaps the strongest contention against an interpretation of *In re Trufort* as sanctioning the renvoi is one made inferentially by Dr. Baty,[46] in discussing the English conflict-of-laws rule which recognizes "the domicile as the one and only forum" in the matter of divorce. He says:

"That is a rule to which there is at any rate one exception, namely, when the law of that forum (that is, the domicile) regards another forum as competent. It is easy to see that this must be so in one case. If the Court of the domicile entirely refuses to deal with the matter, and elects to send the parties to another tribunal, there can be no harm in concurring with it. This is not a case of what is called renvoi — because we can apply Italian *law*, whether Italy likes it or not, but we cannot invoke the Italian *Courts* unless they are agreeable to the reference. If

[45] DICEY (2 ed.), 718–19; WESTLAKE (5 ed.), 39–40, 113–14; BATE, NOTES ON THE DOCTRINE OF THE RENVOI, 112–14; BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 168.

[46] BATY, POLARIZED LAW, 65.

they decline to adjudicate, it is as reasonable to send the parties to the Court indicated by Italy, as to deal with the matter ourselves."

The suggestion is a cogent one as applied to *In re Trufort*, if it be assumed, as seems there to have been the case, that the French courts would have declined entirely to take jurisdiction and have referred the parties on to the Swiss courts.

The next important English case involving the renvoi, *In re Johnson* (*Roberts* v. *Attorney-General*),[47] has been described as "the first case in which the question of the renvoi was clearly and definitely before an English court." [48] There a British subject with a Maltese domicile of origin acquired a domicile of choice in Baden, Germany, and died so domiciled. She left a will which was found to be executed in accordance with the law of Baden, but which did not dispose of all her movables. A question arose as to whether these undisposed-of movables should be distributed according to Baden law, or the law of the testatrix's domicile of origin. It was found that according to Baden law the property would be distributed conformably to deceased's national law. The court (Mr. Justice Farwell) held the distribution should be made according to testatrix's national law, here the law of Malta, her domicile of origin.

Two alternative lines of argument were used in arriving at this conclusion. *First*, the court contended that the deceased did

---

[47] [1903] 1 Ch. 821.

In the interim between *In re* Trufort and *In re* Johnson, there were two English cases bearing on the renvoi, the one directly, the other only incidentally by way of *dictum:* In the Goods of Brown-Sequard, 70 L. T. (N. S.) 811, and *In re* Martin (Loustalan *v.* Loustalan), [1900] P. 211. In the former case the will of an Englishwoman, domiciled at death in France, was admitted to probate on uncontested *ex parte* motion, although executed in the English and not the French form; the admission to probate was based upon the ground that the evidence (the undisputed affidavit of a single French advocate) showed that the French courts would give effect to the will so as to pass thereunder any property in France belonging to the deceased, because of its compliance with the form prescribed by her national law; the opinion, which is only eight lines long, assumes the whole question of the renvoi without any consciousness on the part of the court of the principle involved, and with no reference to prior English cases; it is therefore entitled to little, if any, weight as a precedent. In the latter case (*In re* Martin), the President (Sir F. H. Jeune) of the Probate Division expressed with a doubt a *dictum* involving a renvoi solution of the case (pages 216–18); the Court of Appeal, however, did not pass upon the soundness of this *dictum*, reversing the decision of the Probate Division on other grounds.

[48] BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 169.

not establish in Baden such a domicile as would regulate succession to her property, because the law there disregarded domicile as the basis for post-mortuary succession to property; wherefore the court argued there had been no *de facto* change of domicile. The language of the court on this point is worth quoting (page 828):

"When, therefore, the law of the land said to be chosen as the new domicile disregards domicile and declines to distribute in accordance therewith or to treat it as of any force, there cannot have been any change of domicile *de facto;* and the case is accordingly remitted to this Court as a case where the propositus has intended but has failed to obtain an effectual domicile of choice. No change is effectual unless the factum is proved, and *the factum cannot exist in a country where the law refuses to recognize it.* The result is that this Court must conclude that a domicile of choice, ineffectual to create any rights and liabilities governing the distribution of movables in the country supposed to have been chosen, is for this purpose no domicile at all, and that the propositus, therefore, is left with his domicile of origin unaffected. The Baden Courts would in effect have disavowed him and disclaimed jurisdiction."

The suggestion that a *de facto* situation cannot exist unless recognized by some law does violence to language as currently used. The announcement that the testatrix could not in fact reside in Baden with the intention of making her permanent home there, unless some law of Baden took account of this *de facto* condition, is both startling and absurd. What the court probably meant to say was, that there was no law of Baden applicable to the succession to this property, since that law did not recognize domicile as a sufficient tie between the owner of property and Baden territory to invoke the jurisdiction of Baden law. In other words the Baden law desisted and refused to be applied. Thus interpreting Baden law the court was thrown back on the next preceding applicable law, that is, the law of testatrix's domicile preceding her sojourn in Baden. In this fashion the court was led to decree a distribution according to the law of Malta, where testatrix was domiciled at birth and also immediately before going to Baden.[49]

[49] The court's assumption that the Baden courts would have declined jurisdiction was erroneous. See 9 ZEITSCHRIFT FÜR INTERNATIONALES PRIVAT- UND STRAFRECHT, 134; 10 COL. L. REV. 336; BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 170, note (*a*); 19 L. QUART. REV. 245 (4). Furthermore there was no evidence before the court that the Baden courts would have declined jurisdiction; the evidence showed merely that according to the Baden rule the courts there would have

The second line of argument adopted by Mr. Justice Farwell in reaching the conclusion that Maltese law should control the distribution of the English movables was predicated upon the assumption that the testatrix acquired a domicile in Baden, and that the Baden courts would not have renounced jurisdiction over the distribution of her movables. Proceeding in this manner the court attempted to extraterritorialize itself as a Baden court and reach the same result that such a court would arrive at by an application of its own law. The Baden courts, argued Mr. Justice Farwell (pages 832–35), would apply the national law of deceased, which in the instant case could not mean English law as a law ubiquitous throughout the Empire, but "to that law as applicable to the particular *propositus*, and not to Englishmen generally without regard to their domicile of origin" (page 835). Since, then, the testatrix's nationality was Maltese, viewing the matter from a viewpoint within the British Empire, Maltese law would be applied by the Baden courts, and should therefore on the assumed premise be applied also by the English court.

The opinion in this case is replete with loose reasoning. Thus the court makes the shocking statement (page 835) that "the law of England distributes such movables in accordance with domicile of origin," though it is elementary that the law of the owner's last domicile and not his domicile of origin is controlling in that regard. If the testatrix had acquired a domicile of choice, either within or without the British Empire before going to Baden, the result reached by an application of the law of Malta as that of the domicile of origin would not necessarily have coincided with the result which would have been reached by the Baden courts. Furthermore the latter result could not be reached without some inquiry into the question as to whether or not the renvoi had become a part of the law of Baden, an inquiry as to which no evidence at all was adduced and no curiosity was expressed by the court.[50] Finally if the testatrix had been a French subject with a Maltese

decreed distribution conformably to the national law of testatrix. See Brown, "*In re* Johnson," 25 L. QUART. REV. 145, 152.

[50] See on this Professor Lorenzen's comment in 10 COL. L. REV. 337–38, and note 38, from which it appears that at the time of the decision of *In re* Johnson the renvoi had been rejected by the law of Baden, though if the testatrix had died after January 1, 1900, the Baden courts would have applied the German Code provisions relative to intestate succession conformably to Article 27 of the *Einführungsgesetz* of that code.

domicile of origin, under the first line of reasoning adopted by the court, the law of Malta would in the end have been applied, whereas under the second line of reasoning French law as the national law of the testatrix would have been applicable. This demonstrates the unsatisfactoriness of the court's reasoning, and the impossibility of knowing just what the case was intended to represent.[51] It is worth noting also that the master's certificate found that the will of the testatrix was valid according to Baden law, but that the legal succession to her undisposed-of property would be governed, according to Baden law, by the law of the country of which she was a subject at the time of her death (page 822). In other words, apparently, though it cannot be said with absolute certainty, the will was tested by internal Baden law and found valid, whereas the undisposed-of property was distributed according to Maltese law, notwithstanding the fact that the English law selected the law of the last domicile as the gauge of both testamentary and intestate succession.

The only English case bearing on the renvoi and cited in the opinion was *In the Goods of Brown-Sequard*. *Collier* v. *Rivaz*, *Bremer* v. *Freeman*, *Hamilton* v. *Dallas*, and the other cases thus far discussed were neither referred to in argument by counsel nor cited by the court. Mr. Justice Farwell did make a passing reference to the Forgo Case and to a scattering of continental juristic writings on the renvoi (pages 831–32), but the opinion shows a signal lack of appreciation of the legal principles underlying an acceptance of the renvoi. No one seemed to be interested to urge upon the court the propriety of applying internal Baden law in the distribution of this property. However, in spite of the fact that the

[51] This objection is discussed by W. Jethro Brown, "*In re* Johnson," 25 L. QUART. REV. 145, 151–52. BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 170–71, has argued that the inconsistency disappears, if the line of argument be rejected which concludes that the testatrix did not get a Baden domicile, because Baden law refused to recognize domicile as of any consequence in the distribution of movables; this rejection, it is contended, should be made in view of Lord Lindley's pronouncement in *In re* Martin, [1900] P. 211, 227, that the domicile of the testatrix must be determined exclusively by reference to English law. Lord Lindley was undoubtedly right in making this statement, notwithstanding the fact that it was made in a dissenting opinion. See, on the matter of the ascertainment of domicile in the English courts by applying English rules as to domicile alone, 20 HARV. L. REV. 226, note. This error on the part of Mr. Justice Farwell, however, even though it may be rejected, must certainly shake the authority of the case as a renvoi precedent.

case is quite unsatisfactory from any point of view it was followed blindly and without comment in *In re Bowes*,[52] where the will of a testator of British nationality, who had acquired a *de facto* domicile in France without, however, the authorization necessary under French law, was held to be governed as to validity, construction, and administration by English law.

One of the most unique cases commonly cited to sustain the proposition that the renvoi has been definitely accepted by the English courts is *In re Baines*.[53] There a British subject, probably domiciled in England, owned Egyptian land, which he disposed of by a will valid as to form both by English and Egyptian law. Under the will the executors sold the land. They then deposited the proceeds of the sale in a bank in England. An issue arose as to the disposition to be made of these proceeds. The provisions of the will in respect thereto were valid by English law, but were invalid according to the local Egyptian law. Concededly the right to the proceeds depended on the right to the succession to the land, a matter which under English law would be referred to the law of the *situs*. However, under articles 77 and 78 of the Egyptian Civil Code, succession to land in Egypt was to be governed by the national law of the deceased owner. The testimony of experts in Egyptian law was adduced to show that the Egyptian courts would construe these code provisions in their application to the case in hand as requiring a reference to the ordinary territorial law of England. The dispositions made by the will were accordingly held valid because in conformity with English law. On the surface of things this case seems to be an instance of renvoi in reference to succession to immovables, and such is the view of the case commonly entertained.[54]

This decision, however, would seem to be sustainable on other grounds. Since the property was located in Egypt on the testator's death, rights therein must have been crystallized at once at that time in accordance with the provisions of Egyptian law as such. The rights so acquired should obviously not be altered or divested by the mere fortuitous change of the *situs* of the property there-

[52] 22 T. L. R. 711 (1906).

[53] Unreported; decided March 19, 1903, by Mr. Justice Farwell. A digest of the case is to be found in DICEY (2 ed.), 723.

[54] DICEY (2 ed.), 723; Lorenzen, 10 COL. L. REV. 338; BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 175.

after. It would seem, therefore, to have been incumbent upon the English court in ascertaining the rights in the proceeds which still represented the *res* to determine the question exactly as if it were sitting as an Egyptian court administering Egyptian law. If, however, the property had been physically located in England on the testator's death, the English court in determining rights therein would have been called on to enforce only English law as law, and any foreign law to which it might have been referred by its conflict-of-laws rules would have been operative only as a fact and not as law. In spite of all of this it may very well be, in view of the fact that the case was decided by the same judge who decided *In re Trufort*, that the argument of the opinion proceeds on a renvoi premise, though the only report of the case is so meager as to make certainty of statement in this respect impossible.[55]

The most recent English case involving the renvoi is *Armitage* v. *Attorney General*.[56] The case arose on petition under the Legitimacy Declaration Act, 1858 (21 & 22 VICT. c. 93), praying for the declaration of the validity of petitioner's marriage. Petitioner, an Englishwoman, had previously married one Gillig, an American citizen domiciled at all times in New York. Some years later she went to South Dakota and established there such a domicile as to confer on the South Dakota courts jurisdiction over her marital status under the local law. Thereupon she filed suit for divorce, to which Gillig filed an answer and cross-claim. Petitioner was granted a decree of divorce on the ground of desertion, and possibly also cruelty, though this was not entirely clear from the recitals

[55] The Supreme (British) Consular Court in Egypt reached a result opposite to that which Mr. Justice Farwell anticipated would be reached by the Egyptian courts, in the case of In the Goods of William Torrey Grant, deceased (reported in 34 LAW MAG. AND REV. 5th series, 296–98). There the consular court, applying first of all the Egyptian conflict-of-laws rule, embodied in Article 77 of the Mixed Civil Code effectuating the national law of the deceased respecting the inheritance of his Egyptian land, construed this reference to be to the conflict-of-laws rule of the deceased's national law, here the rule that the *lex situs* should govern, in this manner ultimately applying the Mussulman law of inheritance as enforced in Egypt. The decision has been attacked as an improper construction of Article 77, but not because of its renvoi feature. See Sanderson, "The Law Applicable to the Succession to Land in Egypt owned by a British Subject," 20 JUR. REV. 47. It has also been contended that the case has since been overruled by a later decision of the same court, though again apparently not with respect to the renvoi argument. BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, 174–75.

[56] [1906] P. 135.

of the decree. Neither ground was recognized by New York law as a proper one for divorce. Petitioner thereafter remarried "an English gentleman, always domiciled in England" (page 140), and there were four children as the issue of this marriage. It was for the declaration of the validity of this second marriage that the present suit was brought. Gillig had also remarried, and had filed a petition for a declaration of the nullity of his second marriage on the ground that petitioner was still his lawful wife because of the nullity of the South Dakota decree of divorce. The issue in both cases turned upon the recognition that would be accorded to this decree by the English courts. Evidence was introduced to show that the New York law would allow a married woman to get a domicile separate and apart from her husband for the purpose of suing for divorce, and that the Dakota decree would therefore be recognized and enforced by the New York courts. Under the English rule, however, petitioner would not have had capacity to establish a domicile of her own, in advance of her securing a divorce at the last domicile she had in common with her husband; in other words, only the courts of New York would have jurisdiction to decree a divorce in her favor.

The English court (Sir Gorell Barnes) held that it would put itself in the position of a New York court, thus reaching the result which the evidence showed such a court would have reached if confronted with the case. The fact that both parties to the first marriage had remarried was a persuasive fact, moving the court to sustain petitioner's second marriage if that could possibly be done. The language of the court which shows that it assumed a renvoi attitude to accomplish this result is as follows (page 141):

"The evidence, in the present case, shows that in the State of New York the decision of the Court of South Dakota would be recognized as valid. The point then is: Are we in this country to recognize the validity of a divorce which is recognized as valid by the law of the domicile? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognized in the State of New York — the State of the domicile — as having affected and determined it."

Characteristically of opinions in cases involving the renvoi, no English or foreign case or authority touching on the matter of

the renvoi was cited or referred to in the instant opinion. In fact the word "renvoi" does not appear therein. The whole question is assumed as if the answer propounded by the court were the only possible one under the circumstances, and were entirely obvious.

This completes the roster of English cases on the renvoi.[57] It should be stated, however, that in view of the fact that the digests contain no renvoi heading, and the cases must be searched out more or less at random, it is not unlikely that there are cases other than those heretofore discussed relating to that doctrine. The actual extent to which it has played a part in the case law, either of England or of this country, cannot be stated with any assurance of accuracy.

Along with the English renvoi cases should be put the Canadian case of *Ross* v. *Ross*.[58] A merchant whose domicile was at all times Quebec, while temporarily in New York City, made a holographic will in the form allowed by the law of Lower Canada, but not by internal New York law. The Quebec conflict-of-laws rule as to testamentary form effectuated the law of the place of execution of the will, *locus regit actum*, but there was some doubt

[57] In *In re* Simpson, [1916] 1 Ch. 502, 508, there occurs language which smacks of the renvoi. There a British subject died domiciled in France, leaving a will in the French but not in the English form. An issue arose as to whether the language of the will evidenced an intention to exercise a power of appointment. Evidence as to French law was to the effect that the will was amply sufficient to pass all property which the testatrix could in any way dispose of at her death; that the French law did not recognize the difference between power and property as understood in English law; and that the French courts if asked whether the power had been exercised by this will would receive evidence as to the difference between power and property in English law, and then consider whether the will on its face evidenced an intention to exercise the power. In other words, there seems to have been here a genuine *désistement* on the part of French law with respect to the jural matter in issue. The court (Mr. Justice Neville) said (page 508): "The will is a valid will in England, but the testatrix being domiciled in France the construction would be *prima facie* in accordance with French law. The evidence shows that the words used would be sufficient according to French law to pass all her personal property. A power of disposition by will over property not belonging to the testator is, however, unknown to French law, and in ascertaining whether the will disposed of such property a French court would be compelled to inquire what such a power was, and how it could be executed by an English will. The answer would be that the bequest if contained in an English will would be sufficient to pass the property subject to the power. *And so in an English court the construction which would be applied to an English will must be applied to the construction of a French will valid in England so far as regards the power.*"

[58] 25 Can. S. C. 307 (1894).

as to whether this rule was imperative, or only permissive, and intended to supplement the primary rule effectuating the domiciliary law of the testator. A majority of the court were of the opinion that the rule was permissive or facultative, and that, therefore, the will was valid because executed in the Quebec form. The majority further held that even if the rule *locus regit actum* were imperative in its application to testamentary form, the will was none the less valid, since by the law of New York, the *locus*, the formal validity of a will was to be tested by the testator's domiciliary law, here the law of Quebec. This latter point, which though a *dictum*, is a clear application of the renvoi in the matter of testamentary form, was assumed by the majority to be self-evident, and no authority was cited to sustain it; neither was there any discussion of it on principle.

Two judges (Mr. Justice Fournier and Mr. Justice Taschereau) held that the Quebec conflict-of-laws rule, *locus regit actum*, was imperative, and were therefore called upon either to accept or to reject the renvoi. Mr. Justice Fournier accepted the renvoi ordered by New York law, thus basing his decision on the *dictum* of the majority, and thereby sustaining the will.

Mr. Justice Taschereau, proceeding from the position that the rule of *locus regit actum* was imperative, held the will to be invalid because not in the form required by internal New York law, thus rejecting the renvoi offered by the New York conflict of laws. The dissenting opinion in which this result was reached is in most respects the best judicial exposition of the renvoi to be found in Anglo-American case law. The only English renvoi cases referred to and made the basis of an anti-renvoi argument were *Bremer* v. *Freeman* and *De Bonneval* v. *De Bonneval.* The renvoi issue, as adapted to the facts of the case in hand, was thus stated (page 356):

"I utterly fail to understand the import of the rule *locus regit actum*, if it does not mean, adapting it to this case, that a Quebecer who desires when in New York to make a will has to make it according to the form required by the law of New York for its own subjects; or to put it in other words, if a will in the holograph form made by a New Yorker in New York is void under the New York law in New York, a Quebecer's will in that form made in New York is also void in Quebec, which is Ross's *lex domicilii*."

The arguments of Mr. Justice Taschereau rejecting the renvoi as to testamentary form, and holding the will to be invalid for failure to comply with internal New York law as to form, were principally these:

1. That section 2611 of the New York Code of Civil Procedure (enacting that "a will of personal estate, executed by a person not a resident of the state according to the laws of the testator's residence, may be admitted to probate"), which was the New York conflict-of-laws rule regarded by the majority as referring to internal Quebec law for the ascertainment of the validity of the will as to form, was intended to apply only to the personal estate of the testator in New York;

2. That to invoke the *lex domicilii* rule of New York law was in effect allowing the New York legislature to change the Quebec conflict-of-laws rule as to testamentary form, by making it optional for a Quebecer executing a will in New York to follow either internal New York law or internal Quebec law as to form. This argument was cogently stated as follows (pages 353–54):

"And the New York legislature had not the power to alter that law (*i. e.* the rule of *locus regit actum*) for the province of Quebec, and to decree that a Quebecer could in New York make his will either according to his *lex domicilii* or to the *lex loci actus*, or to neither one nor the other, but according to a mixture of both, at least so as to affect movables in Quebec.

"It cannot be that the legislature of New York had the right to pass a statute in the following terms: 'Whereas by the law of the province of Quebec a holograph will made in New York by a citizen of the province is invalid in Quebec; whereas it is expedient to provide otherwise; it is hereby decreed that hereafter such a will shall be valid.' Could such an enactment affect property in Quebec? I would say not, and the legislature never intended to do so. To give to their statute the meaning that the respondent contends for would be to extend it in a manner not justified by any principle of law that I know of.

"The respondent, in other words, would argue, at least his argument leads to it, that though the legislature in Quebec has refused to adopt the change in the law made in this respect as to holograph wills by Article 999 of the Code Napoléon or by Article 1588 of the Louisiana Code, yet the New York legislature has done it for them."

3. That the will in issue would be held invalid even by the New York courts. If those courts were passing upon the validity of

this will, argued the learned justice, they would in the first instance apply the rule that the law of the testator's last domicile is controlling as to testamentary form; this would occasion a reference to Quebec law, which in turn would refer back again to New York law, according to which a holographic will was not a testamentary act. The same result would be reached, as shown at a later point in the argument, if the will had been made in England, where holographic wills, as in New York, were unknown to the law; if in such a case the New York courts were petitioned for the probate of the will of this Quebecer, domiciled in Quebec at death, they would again refer to the law of the testator's domicile, that is Quebec, which in turn would refer the matter on to the law of England as the place of the execution of the will; under English law no testamentary act would have been enacted, and hence the probate of the assumed will would be denied.

Curiously this last argument of the learned justice was itself predicated upon an acceptance of the renvoi by New York law, both in the sense of "remission" or *Rückverweisung* and "transmission" or *Weiterverweisung*. In substance it amounts to a declaration that while the renvoi may do well enough for the foreign law to which the conflict of laws of the forum refers in a given case, it has no place in the law of the forum itself. This argument is the one blemish on the otherwise excellent and sound dissenting opinion.

It is now submitted that the following propositions may fairly be deduced from the foregoing discussion of the renvoi in the light of legal principle and English case precedents:

1. That the doctrine of the renvoi in any form is out of harmony with Anglo-American principles of the conflict of laws;

2. That the extent to which, if at all, it has become imbedded in English case law is a matter of some doubt, in view of the fact that there has been no decision of the matter by either the House of Lords or any court of appeal:[59]

[59] There is a conflict among writers as to whether the renvoi has been accepted as a principle of the English conflict of laws: that it has been so accepted, see DICEY (2 ed.), 715–23, WESTLAKE (5 ed.), 25–42, BENTWICH, THE LAW OF DOMICILE IN ITS RELATION TO SUCCESSION, chap. 8; that it has been rejected, see Abbott, "Is the Renvoi a Part of the Common Law?" 24 L. QUART. REV. 133; that the English law is in doubt, see Lorenzen, "The Renvoi Theory and the Application of Foreign Law,'

3. That in cases where an application of the renvoi occasions a reference back again to English law, *i. e.*, in cases of "remission" of *Rückverweisung*, it has been accepted by English probate courts when the testamentary formalities of English law are declared adequate by the foreign law to which the English rules of the conflict of laws refer. *Bremer* v. *Freeman*, the only case which has gone to an appellate court, is of doubtful authority either for or against this proposition:

4. That in cases where an acceptance of the renvoi occasions a reference on to the law of some third legal unit, *i. e.* cases of "transmission" or *Weiterverweisung*, the English cases have been more favorable to the renvoi, and have accepted it (*a*) where a foreign judgment as to post-mortuary succession to movables was involved (*In re Trufort*), and (*b*) where the validity of a decree of divorce was in question (*Armitage* v. *Attorney General*).

B. Renvoi Cases in this Country

There is only a scattering of cases in this country in which the renvoi has been involved, and in none of them is there any discussion of that doctrine either on principle or on authority. The earliest case here in which there is even a suggestion of renvoi is *Dupuy* v. *Wurtz*.[60] The issue in the case turned on the validity of a will executed in France by a testatrix whose domicile of origin was New York. The will was in compliance with New York form, but was contested on the ground of non-compliance with the law of France where it was alleged testatrix was domiciled at death. The court found that the testatrix had never abandoned her domicile of origin, and accordingly affirmed the decree admitting the will to probate. By way of *dictum* the court also held that even if testatrix's last domicile was France, nevertheless the will was valid, because French law was not according to the decisions of the French courts construing Article 13 of the French Civil Code, applicable to the testamentary acts of foreigners resident in France, who had not established there an authorized domicile. The contrary ruling of the Privy Council in *Bremer* v. *Freeman* was shown to have been overruled by later French cases. The court

10 Col. L. Rev. 190, 326; Bate, Notes on the Doctrine of the Renvoi, 9, 77, 108–120; Baty, Polarized Law, 115–20.

[60] 53 N. Y. 556 (1873).

also found that the will in issue would be sustained by the French courts if executed in the form required by New York law. This *dictum*, and such it was, since the court expressly said that the decision of the case might safely be rested "upon the ground that, irrespective of the consideration arising upon Article 13, no domicile in France was established" (page 574), proceeds upon both the *désistement* and the straight renvoi theories. The court did not discuss the principles underlying either theory. Indeed it is rather apparent that the court was not conscious of the juristic difference between them, or of the possibility of a doubt as to the propriety of accepting either or both.

Harral v. *Harral*[61] was a suit by a wife claiming a half interest in her husband's movable estate by virtue of a marriage celebrated in France under the community-of-goods system. The husband was a domiciled New Yorker. He went abroad to pursue his medical studies, and after acquiring a domicile *de facto* in France, married the petitioner. His domicile thereafter and until his death was France. The executors, next of kin, and legatees of the husband, who had made a will before leaving New York in which he disposed of all his property, contended that petitioner had no claim to a share in the estate, because the testator had not established in France an authorized domicile in accordance with Article 13 of the French Civil Code. Under the common-law conflict-of-laws rule the rights of the wife in her husband's movable property would depend upon the law of the husband's domicile at the time of marriage, here France. The contention of the wife might have been sustained on this simple ground, without reference to French law. And this seems to have been the view taken by the chancellor. He said:

"Although Dr. Harral had not been admitted to the civil rights of a Frenchman, or, in other words, had not, to use our form of speech on the subject, become naturalized in France, that fact did not prevent him from obtaining a domicile, in fact, there. And the rights of the complainant are to be determined, not by the decision of the question whether her husband assumed allegiance to the government of France, but by the decision of the question whether, when the marriage took place, he was domiciled, in fact, in that country. See "Dicey on Domicil," 362. Several cases are cited in which the French courts have held that, in the absence of any express nuptial contract, the husband's mere

[61] 10 Stew. Eq. (N. J.) 458 (1883); 39 N. J. Eq. 279 (1884).

domicile, in fact, determined the widow's rights in his personal estate. It is urged that there are decisions of those courts to the contrary also.

"*But it is a question not depending for its determination merely on the decision of the French courts. It is a question of international law, upon which the adjudications of those courts are indeed of very high importance, but it is to be decided in this case here according to what may seem to be just views and principles.*"[62]

The Court of Errors and Appeals, however, made an extensive inquiry into the French law, and came to the conclusion that a matrimonial domicile might be acquired in France, so as to subject all the movable property belonging to either party at the time of marriage to the operation of French law, by six months' residence in France, without the authorization described in Article 13 of the French Code. The result of this finding of French law was that it made no difference whether the court considered itself sitting as a New Jersey court, or as a French court, so far as the disposition of the case in hand was concerned. On either theory the contention of the wife would properly prevail. If, however, the court regarded itself as functioning as a French court charged with the administration and enforcement of French law as law, it thereby in substance accepted the renvoi doctrine. But the authority of the case is greatly weakened in this respect by the fact that the result reached by an acceptance of the renvoi was no different from the result to be reached by a rejection of that doctrine.

In *Lando* v. *Lando*[63] two persons, both citizens of Minnesota, married while temporarily in Hamburg, Germany. On the death of the supposed husband, the wife objected to the granting of letters of administration to the former's father on the ground that she was deceased's lawful wife, and as such entitled to precedence in the matter of administration. Thus the validity of the German marriage was drawn directly in question. The deceased's father contended that the marriage was invalid because not celebrated before a person authorized by German law to perform a marriage ceremony. Article 13 of the *Einführungsgesetz* of the German Code was stipulated in evidence as the applicable German law. One section of this article provides that the validity of a

[62] 10 Stew. Eq. 468–69.

[63] 112 Minn. 257, 127 N. W. 1125 (1910).

marriage depends upon the national law of the contracting parties; another section, that the form of a marriage concluded within the Empire is determinable "exclusively by German Law." The wife contended that the former section was the proper one to apply, and that, therefore, the marriage was valid because in conformity with Minnesota law. The court after noting that "the proper interpretation of the provision (Article 13 of the German Code) abounds in doubt and uncertainty" (page 263), sustained the wife's contention principally on the ground that every presumption was to be indulged in favor of the validity of a marriage.

The case is devoid of all argument of the renvoi either on principle or on authority, and the whole point is assumed without question as dependent solely upon the proper interpretation of the German Code provisions. The real principles at stake were not discussed either by court or counsel. Furthermore the decision proceeds upon a rather obvious mistake as to the meaning of the German Code provision stipulated in evidence. The purpose of that provision was to subject the validity of a marriage celebrated in Germany to the national law or laws of the parties in all matters of substance, and to internal German law as regards questions of form.[64]

Guernsey v. *Imperial Bank of Canada*[65] was an action by the holder of a promissory note against the indorser. The note was executed, delivered, and indorsed in Illinois. It was payable in Canada. Demand, protest, and notice of dishonor all complied with the requirements of Canadian law. It was agreed, however, that these steps to charge the indorser were not in accordance with the requirements of the law of Illinois, if the note had been payable there. The indorser contended that the sufficiency of the notice was to be gauged by Illinois law because his contract as indorser was made in that state. To this contention the court made this brief answer (page 301):

"To this contention there is a short and conclusive answer. The place of the indorsement was the state of Illinois. The law of that State was, when the indorsement was made, and it still is, that when commer-

[64] SCHUSTER, PRINCIPLES OF GERMAN LAW, 480, 490; 6 PLANCK, BGB. 48–54; STAUDINGER, KOMMENTAR ZUM BGB. (7/8 *auf.*), EG. 64–72; NIEDNER, KOMMENTAR ZUM BGB. (*2te auf.*), EG. 37–41.

[65] 188 Fed. 300 (1911).

cial paper is indorsed in one jurisdiction and is payable in another the law of the place where it is payable governs the time and mode of presentment for payment, the manner of protest, and the time and manner of giving notice of dishonor, and the law of the place of indorsement is inapplicable to them. *Wooley* v. *Lyon*, 117 Ill. 248, 250, 6 N. E. 885, 886, 57 Am. Rep. 867. If, therefore, as counsel contend, the law of the place where the indorsement was made, the law of Illinois, governs the sufficiency of notice of dishonor in this case, that notice was good, for it was sufficient under the law of Canada where the note was payable, and the law of Illinois was that in a case of this character the law of the place where the note was payable governed the time and manner of giving the notice of dishonor."

The above was really only a *dictum*, since the case was finally disposed of on the ground that the manner of giving notice of dishonor and the sufficiency of that notice were governed by the law of the place of payment of the primary obligation on the instrument, and not by the law of the place where the indorser's contract was made. In substance this *dictum* involves an acceptance of the renvoi in the sense of "transmission" or *Weiterverweisung*. In any event the holding in this respect both because it is a *dictum*, and for the further reason, that it is a mere hasty assumption of the court made without any consciousness of the real principles involved, is entitled to little, if any, weight. The case suggests, however, a fertile field for the application of the renvoi should it ever gain a foothold in our law, that is, in the field of the choice of law governing contractual validity and obligation.

In *Bell* v. *Riggs* [66] a somewhat analogous question was presented. There suit was brought for the cancellation of a note and the mortgage securing it. The note was executed and delivered in Oklahoma but payable in Kansas; the land on which the mortgage was given was in Oklahoma. The mortgage deed contained a provision that both the note and mortgage should be construed according to Oklahoma law. The note was negotiable by the law of Kansas, but non-negotiable according to Oklahoma law. It was contended that the law of Oklahoma should govern, since the parties had expressly so agreed, but that since Oklahoma law would refer the question of the negotiability of this note to the law of the place of payment, the result was that the law of Kansas, according

[66] 34 Okla. 834, 127 Pac. 427 (1912).

to which the note was non-negotiable, would ultimately govern. The only answer of the court was that "this argument, if plausible, is certainly not more than plausible" (page 844). In this case then the court used a line of argument which when used by counsel in the previous case was condemned by the court. It should be said, however, that inasmuch as the parties expressly agreed that Oklahoma law should govern their contract, the case might have been decided without reference to any question of the renvoi, on the plain ground that the parties meant by the law of Oklahoma that law as applicable to a note made and payable in Oklahoma; that is, the case could be disposed of by a construction of the meaning of the language of the parties. In this view the case presents no renvoi question at all, and it is not clear that the court did not mean to treat the case as one raising only a question of construction. The case has, however, been approved on the ground that it rejects the renvoi.[67]

The cases in this country thus show even less fair appreciation of the principles underlying the renvoi than do the English cases. Indeed the word "renvoi" seems not to have been spoken in an American court by either court or counsel, though a renvoi process has occasionally been sanctioned or rejected by the courts. In view of the insidious nature of the renvoi, the impossibility of ascertaining definitely the extent to which it has functioned in Anglo-American case law, the discordance of that doctrine with common-law conceptions of the conflict of laws, it is time that

---

[67] 11 MICH. L. REV. 236.

White *v.* Holly, 80 Conn. 438, 68 Atl. 997 (1908), presents an issue very similar to that of the principal case. There a settlor under a deed of trust reserved for herself a power to appoint the trust *res* "by any writing in the nature of a last will and testament executed according to the forms required by the statutes of Connecticut then in force at the time of such execution by her for a will of real estate." The settlor left a will executed in New York and attested by two witnesses, which purported to exercise the power. The will was valid under New York law, but was not attested by a sufficient number of witnesses to comply with Connecticut law. A statute of Connecticut, however, provided that a will executed according to the law of the place of execution should be admissible to probate in Connecticut and pass any property there located. It was held that the power was properly exercised, since the will conformed to the requirements of this statute. In other words the provision in the deed of trust specifying the manner of exercise of the power was taken to refer to the *locus regit actum* principle of the Connecticut conflict of laws enacted by the statute in question. The real issue, however, was one of construing the language of the instrument creating the power, and not of renvoi.

both court and counsel addressed themselves consciously to the problems which it involves. An examination into its merits and demerits will, it is believed, require its rejection in all but the most exceptional cases.

Ernst Otto Schreiber, Jr.[68]

[68] ERNST OTTO SCHREIBER, Jr., was born at Lansing, Michigan, December 4, 1888. The son of a German immigrant, he secured for himself a good education, graduating from the George Washington University with the degrees of A.B. in 1910, and LL.B. (with honor) in 1912. He was invited to teach in the Law School, and proved himself a teacher of unusual force and ability. He obtained a leave of absence for the year 1916–17, and entered the Harvard Law School as a graduate student; receiving the degree J.S.D. at Commencement, 1917, when he was selected to represent the Law School on the Commencement platform. Shortly before Commencement he contracted a severe case of typhoid fever, and was actually affected with delirium when he delivered his oration. A few days later he died.

The article here published was presented as a thesis in the Conflict of Laws Seminar in the spring of 1917.